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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

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9 EDWARD BARBER,

Case No. 2:16-cv-00103-RFB-CWH

10 Petitioner,

ORDER

11 v.

12 BRIAN WILLIAM, et al.,

13 Respondents.

14 Petitioner has submitted a *pro se* petition for writ of habeas corpus, pursuant to 28  
15 U.S.C. § 2254 (ECF No. 1-1). However, petitioner has failed to submit an application to  
16 proceed *in forma pauperis* or pay the filing fee. Accordingly, this matter has not been  
17 properly commenced. 28 U.S.C. § 1915(a)(2) and Local Rule LSR1-2. Therefore, the  
18 present action will be dismissed without prejudice. Petitioner may file a new petition with  
19 either the \$5.00 filing fee or a completed pauperis application with all required  
20 attachments. The pauperis application must include both an inmate account statement  
21 and a properly executed financial certificate.

22 Further, petitioner indicates that his appeal of the denial of his state postconviction  
23 petition is pending before the Nevada Supreme Court (ECF No. 1-1, p. 5; see also Nevada  
24 Supreme Court Case No. 67988). A federal court will not grant a state prisoner's petition  
25 for habeas relief until the prisoner has exhausted his available state remedies for all  
26 claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner  
27 must give the state courts a fair opportunity to act on each of his claims before he presents  
28 those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844

1 (1999); see also *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains  
2 unexhausted until the petitioner has given the highest available state court the opportunity  
3 to consider the claim through direct appeal or state collateral review proceedings. See  
4 *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374,  
5 376 (9th Cir. 1981). As indicated by both the petitioner and the state court docket,  
6 petitioner is currently pursuing state postconviction relief, and therefore, his petition is at  
7 least partially unexhausted.

8 It does not appear from the papers presented that a dismissal without prejudice  
9 would result in a promptly-filed new petition being untimely. In this regard, petitioner at  
10 all times remains responsible for calculating the running of the federal limitation period as  
11 applied to his case, properly commencing a timely-filed federal habeas action, and  
12 properly exhausting his claims in the state courts.

13 **IT IS THEREFORE ORDERED** that this action is **DISMISSED WITHOUT**  
14 **PREJUDICE** to the filing of a new petition in a new action with a properly completed  
15 pauper application with all new and complete financial attachments.

16 **IT IS FURTHER ORDERED** that petitioner's ex parte motion for appointment of  
17 counsel (3) is **DENIED** as moot.

18 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**, as jurists  
19 of reason would not find the court's dismissal of this improperly commenced action  
20 without prejudice to be debatable or incorrect.

1           **IT IS FURTHER ORDERED** that the Clerk shall send petitioner two copies each  
2 of an application form to proceed *in forma pauperis* for incarcerated persons and a  
3 noncapital Section 2254 habeas petition form, one copy of the instructions for each form,  
4 and a copy of the papers that he submitted in this action.

5           **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT** accordingly  
6 and close this case.

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8           DATED: 16 April 2016.

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10           RICHARD F. BOULWARE, II  
11           UNITED STATES DISTRICT JUDGE

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